IN THE

Supreme Court of the United States

October Term, 1962

No. 48

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY, *Respondents*.

No. 50

CITY OF PITTSBURGH, *Petitioner*,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY

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Dated: September 19, 1962

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DEFINITION OF TERMS

Columbia Companies	—The Manufacturers Light and Heat Company, The Ohio Fuel Gas Company and United Fuel Gas Company.
Commission	—Federal Power Commission.
Cost Allocation	—An apportionment of the cost of service to the various rate zones and to the classes of service within each zone.
Cost of Service	—Summary of all operating expenses and all other costs of providing service, including a reasonable return and income taxes associated with such return, for a specific twelve-months period.
"Floor" Rate	—The last rate determined by the Commission to be "just and reasonable."
Lawful rates	—Rates which the Commission has determined are *not* "unjust, unreasonable, unduly discriminatory, or preferential" so as to be final until modified prospectively under the Natural Gas Act.
"Legal" rates	—Rates which have been put into effect subject to refund at the end of a suspension period to be continued during the refund period until superseded by *lawful* rates.
"Locked-in" Period	—This period begins when rates filed under Section 4 of the Natural Gas Act, become effective subject to refund and ends when rates subsequently filed become effective. Each succeeding and superseding change in rates is docketed by a separate

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BRIEF FOR RESPONDENTS, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY AND UNITED FUEL GAS COMPANY

Question Presented

The Commission recognized that this controversy existed and set a prior collateral proceeding (Docket No. G-11980) to determine proper principles and methods of cost allocation which would be controlling. Before the decisional process was completed in said Docket No. G-11980, the Commission—in a separate (the underlying) proceeding, Docket No. G-19983—ordered Tennessee to reduce its rates solely because of a disallowance of a claimed rate of return of 7 per cent and a determination that the fair, just and reasonable rate of return for Tennessee is 6.8 per cent and *upon the basis of Tennessee's contested method of cost allocation.* Columbia Companies were precluded from presenting evidence in the rate of return phase of Docket No. G-19983 to show the allocation of such costs on Columbia Companies' method.

The question which arises under Sections 4 and 5 of the Natural Gas Act and Sections 5, 7, 8 and 12 of the Administrative Procedure Act is:

Did the Commission abuse its discretion or act outside the ambit of the statutes by ordering in Docket No. G-19983, the use of a contested method of cost allocation in requiring Tennessee to reduce its rates and make refunds (1) prior to a final determination in Docket No. G-11980 of the issue of proper principles and methods of cost allocation which issue is essential to a determination of (a) whether certain specific filed rates were unduly low and preferential and (b) whether the allowance of a finally determined fair rate of return to Tennessee would prevent overcharged customers from receiving refunds to which they were entitled, and (2) while precluding Columbia Companies from presenting evidence on cost allocation and rate design in the "rate of return" phase of Docket No. G-19983?

Statutes Involved

Sections 4 and 5 of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U. S. C. 717-717w, are set forth in the Commission's brief, pages 47-51. Pertinent Sections of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001-1011, are set forth in Appendix A, *infra*, page 1a *et seq.*

Statement

The Basic Controversy. The contested issue of the proper principles and methods of cost allocation among Tennessee's rate zones which forms the basis of Columbia Companies' opposition to the Commission's use of the technique of an interim refund order in the underlying administrative proceedings arose long before Tennessee made its rate filing on October 5, 1959, in Docket No. G-19983.

In *1955* the Commission officially recognized the existence of the basic controversy in an order issued October 6, 1955, in Docket No. G-5250, Tennessee's "floor" rate proceeding. Then, in this same proceeding by order issued September 20, 1956, the Commission refused to grant a Tennessee motion for "interim" rates, because all of the participants had not been given an opportunity to present evidence on the zoning issues and the Commission believed it would be premature, unfair and improper to do so.*

In *1957* the Commission set a specific administrative hearing, Docket No. G-11980, to determine a fair and equitable method of cost allocation for Tennessee so as to resolve the issue of whether Tennessee's rates were unduly preferential or prejudicial as among rate zones as contended by Columbia Companies and others (R. 622). Docket No.

*This order is quoted in full in Appendix B of the Commission's brief, pages 52-61, and was before the Court below (R. 642).

G-11980 was heard, the record was closed and briefs to the Examiner were filed four months *prior* to the date of issuance of the underlying administrative order now before the Court (R. 609). Subsequently, the Commission issued its order on principles and methods of cost allocation in Docket No. G-11980.* This order is pending before the Court of Appeals for the District of Columbia Circuit as Case No. 17004 on petition for review filed by Columbia Companies.**

The G-10983 Hearing Before the Commission. At the hearing below in Docket No. G-10983, none of the intervenors, including Columbia Companies, were permitted the opportunity for the introduction of evidence on cost allocation. (R. 50-54, 291-295, 378-379). The Commission was fully informed of and acquiesced in the Examiner's refusal to permit such evidence (R. 577-583, 607-625).

The interim refund and rate reduction order was granted on oral motion of Staff Counsel (R. 525). Columbia Companies opposed the motion by verified pleading and on oral argument to the Commission although without objection to the final determination of a fair rate of return by interim order. Columbia's Memorandum pointed out to the Commission that there is an unresolved complaint by Columbia Companies that Tennessee has violated Section 4(b) of the Natural Gas Act with respect to undue rate discrimination (R. 612-613). It was also pointed out that this controversy has raged for many years and was evidenced by Tennessee's historical rate increases being *disproportion-*

Tennessee Gas Transmission Company, February 6, 1962, 42 PUR 3d 145.

**Also pending are two companion cases, Nos. 14807 and 15160, wherein Columbia Companies are seeking judicial review on the ground, among others, that the Commission erred in permitting Tennessee to misuse the underlying certificate proceedings for ulterior rate-making purposes to the injury of Columbia Companies.

ately higher in zones wherein Columbia Companies were served by Tennessee (R. 614).*

On July 19, 1960, Tennessee filed a motion to decide the rate of return issue in Docket No. G-19083, simultaneously with the cost allocation issue in Docket No. G-11980 while waiving the intermediate decision procedure in the latter case (R. 519-521). Columbia Companies opposed this motion primarily because the parties had literally spent years and hundreds of thousands of dollars on a voluminous and complicated record on the extremely important and seriously contested cost allocation issue and contended that the full decisional process, including the intermediate decision procedure, was essential (R. 658). Columbia Companies believed that the cost allocation issue was of paramount importance and, if the decision was expedited on that issue, it would expedite the determination of Tennessee's other rate cases (R. 659).

The Commission denied Columbia Companies' cross-motion on August 5, 1960, and commented that the present schedule of further hearings in Docket No. G-19083 appears to achieve the effect sought by the cross-motion (R. 523). However, Tennessee's rate cases are still unresolved by the Commission.**.

*Columbia Companies have contended that this rate treatment was occasioned by reason of Tennessee's improvident expansion to New England and other new markets after 1950 at the expense of or subsidization by Columbia Companies. Tennessee expanded its service in its terminal Zones 1, 5 and 6 (including new markets in New York and New England) during the 1952-1958 period without substantial expansion of service to Columbia Companies. In 1954, an Examiner noted that Tennessee would earn only around 3% on its gas service in New England. See *Tennessee Gas Transmission Co., et al.*, Docket Nos. G-2352, *et al.*, orders issued June 15, 1954, 13 FPC 623, and July 16, 1954, 13 FPC 631.

**By order issued August 31, 1962, the Commission has consolidated proceedings in Docket Nos. G-11980, G-17166 and G-19083 and scheduled a prehearing conference to consider *inter alia* "all matters remaining at issue in the above dockets" and a procedure for expediting the disposition of the "entire consolidated proceeding."

After the Commission issued its order of August 9, 1960, which required immediate interim refunds, Columbia Companies filed their petition for rehearing which, among other things, set out as specific error the Commission's statement that Tennessee and its customers would be put "in the same position" that they would have been in had Tennessee originally filed its [illegible] per cent instead of a 7 per cent rate of return basis (R. 582). Columbia Companies noted that under Section 5(a) of the Natural Gas Act the Commission was specifically deprived of the power to order Tennessee to *increase* its filed rates (R. 579) and, therefore, the fact that Tennessee had *voluntarily* filed for higher rates under Section 4(e) in *other* zones gave Columbia Companies an advantage in its zones which they would not have had had Tennessee originally filed upon a basis of 6⅛ per cent return (R. 582-583). These matters were not commented upon by the Commission in its order denying applications for rehearing issued September 27, 1960 (R. 585-591).

Proceedings in the court below. Columbia Companies' petition for stay was denied by the Fifth Circuit, Judge Wisdom dissenting (R. 632-634; *Tennessee Gas Transmission Co. v. FPC*, 283 F.2d 729 (C.A.5 1960)). Tennessee complied with the order by making refunds and filing superseding rates which have been in effect since November 1, 1960.

On the merits, the Court Per Curiam order remanded the case to the Commission for further proceeding in view of the Court's disapproval of the Commission's action (1) in making its interim rate reduction order effective prior to a final determination of the allocation issue and (2) in ordering immediate refunds* (R. 644).

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*It is Columbia Companies' position that the Commission's order is voidable and not void, so that on remand Tennessee could put its originally filed higher rates into effect *prospectively* only.

In addition, on the merits, Judge Wisdom questio[ned] whether the Commission granted a "full hearing" conte[m]plated in Section 4(e) of the Natural Gas Act; whet[her] the order issued after a hearing in which the issue of c[ost] allocation was barred was "lawful"; and whether the inte[rim] order made it so "highly" unlikely, if not impossible, [for] Tennessee to earn a "just and reasonable return" as to m[ake] the order lacking in weight and legal effect (R. 643). [It] was *held*, however,

> "that cost allocation among zones is an integral element in determining whether the filed rates [are so] excessive that it is unreasonable and an abuse of [dis]cretion to issue an interim rate order before decid[ing] a pending allocation issue ripe for decision." (R. 643)

Judge Wisdom stated that

> "The Commission's refusal to decide the cost al[lo]cation issue means that there is no basis for deter[mining] which of the filed rates in specific zones [are] unlawful, the extent to which individual rates sh[ould] be reduced, or to which refunds are due. Moreov[er,] the effect of the interim order is to continue [the] alleged discriminatory differential in favor of Zo[nes] 1, 5, and 6, although the Columbia companies, op[era]ting in Zones 2, 3, and 4, for several years have b[een] endeavoring to have the Commission determine [a] proper cost allocation among the zones." (R. 642)

Judge Tuttle dissenting, recognized that Columb[ia] Companies were entitled under the statute as interest[ed] parties to a determination by the Commission of th[eir] complaint of undue preferences granted to the other zo[nes] in violation of Section 4(b) of the Natural Gas Act, [but] he believed that this determination should not necessar[ily] be before the Commission can eliminate what it finds [to] be an unlawful increment in the price structure (R. 64[3]).

Summary of Argument

I. The primary purpose of the Natural Gas Act is the protection of consumers. However, arbitrary rate reductions cannot be ordered for this salutary purpose, when customers of one zone are vying against customers of another zone, without doing prejudicial harm to the ultimate consumers in one zone or another.

Columbia Companies have contested the rates in Tennessee's six zones as being unduly preferential and prejudicial in violation of Section 4(b) of the Natural Gas Act and have continually sought a determination as to allocation principles and methods which will result in their paying no more than their fair share of Tennessee's total cost of service. In these circumstances, Columbia Companies have a statutory right to a "full hearing" which includes the decisional process granted to them by Sections 4 and 5 of the Natural Gas Act and Sections 5(b), 7(c) and (d), 8(b) and 12 of the Administrative Procedure Act.

A. Sections 4(e) and 5(a) of the Natural Gas Act are controlling and they require a *full hearing and decision* before just and reasonable *rates* can be determined and *refunds* ordered of the portion of such *rates* found to be "not justified". The Commission's finding that the *rates* filed by Tennessee were "excessive" could not lawfully be made solely on the basis of the Commission's determination on the rate of return *cost* item since that determination was not made with respect to the particular *rates* of Tennessee, but with respect to a cost factor in Tennessee's aggregate cost of service. Although the Commission could generalize that Tennessee's rates filed on a 7% rate of return basis would yield excessive revenues, the Commission could not legally determine which of Tennessee's many rates were excessive (or too low) without properly allocating the reduced cost of service to zones and classes of customers. The factors of cost allocation and rate design are *inextricably intertwined*

with cost finding in determining those rates which meet the statutory standards of lawfulness. This is particularly true in this case where serious questions exist as to the discriminatory nature of Tennessee's separate individual zonal and customer rates *inter se*.

The diverse methods of allocation offered by the parties yield such drastically different results that even if there is a substantial reduction in Tennessee's total claimed cost of service, there may be no rate reductions in certain zones depending on the allocation method ultimately found lawful. This demonstrates that it is impossible for the Commission to find that the specific zone rates filed by Tennessee are unlawful until the cost allocation issue is determined.

B. Petitioners, apparently conceding the inconsistency of the Commission's action with the express dictates of Section 4, rely on Section 16 of the Natural Gas Act for statutory support for the Commission's action. Analysis of this section reveals it to be merely administrative in nature and thus offers no statutory basis for permitting the Commission to do that which is prohibited by Section 4, the section explicitly governing the regulation of rates.

C. Petitioners' reliance on earlier cases sanctioning the Commission's interim rate order procedure in certain circumstances is without merit. The crucial factor which dispositively distinguishes those cases from the case at bar is that none of those cases involved a deferred cost allocation issue which could be applied retroactively to alter the results of the Commission's interim rate order and thereby prejudice the parties. On the contrary, these cases are authority for the proposition that parties must have "full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness". *FPC v. National Gas Pipeline Co. of America*, 315 U. S. 575, 583-584 (1942). Columbia Companies did

not have this opportunity in the instant Docket No. G-19983 proceeding, and the controlling collateral case, Docket No. G-11980 is now pending in the Court of Appeals for the District of Columbia.

D. Although a proper determination of the issue of cost allocation was an indispensable prerequisite to a determination of the lawfulness of Tennessee's individual rates, the Commission permitted only Tennessee to put in evidence its own proposed style of cost allocation and did not allow Columbia Companies to develop an evidentiary record, either by its own evidence or by cross-examination of Tennessee's witnesses on basic issues such as cost allocation. The Commission's action was, therefore, in violation of Sections 5(b), 7(c) and (d), 8(b) and 12 of the Administrative Procedure Act.

E. The actions of the Commission herein are an abuse by it of the administrative process. In *Trunkline Gas Company* v. *F. P. C.*, 247 F. 2d 159, (CA5 1957), the court declared that the Commission had no legal right to "change the rules in the middle of the game" and required the Commission to "adjudicate this matter within the full framework fashioned by it". In the instant case the Commission set Docket No. G-11980 as the proceeding in which to determine the basic issue of cost allocation which would be determinative of the propriety of rate reductions in Docket No. G-19983. By replacing rates in Docket No. G-19983 before Docket No. G-11980 is finally decided, the Commission has refused to decide the rate discrimination controversy within the framework that it itself fashioned.

In its order in Docket No. G-11980, issued *after* the complained-of interim rate order, the Commission *did* modify Tennessee's method of cost allocation but not to the extent advocated by Columbia Companies who now have the matter on judicial review. The petition for review of

its earning an administratively determined rate of return, it is prejudiced to the extent that the *possibility* of earning the determined rate of return is eliminated by the improper action of the Commission itself.

By permitting Tennessee to file substitute rates based on a proper rate of return, but otherwise based on the company's own claims, Tennessee and its customers would *not* be placed in the same position as if Tennessee had originally filed increased rates predicated upon a proper rate of return. The Commission lacks the power to compel Tennessee to file higher rates involuntarily. Moreover, if the rates had not been suspended, they could be attacked only through a Section 5 proceeding which does not permit refunds. Under Section 4, where the rates were suspended and put into effect subject to refund, the action of the Commission does not leave the parties in the same position they would have been in if Tennessee originally filed rates based on a 6½ per cent rate of return, since that portion of the interim refund going to the already undercharged zones would have been available to Tennessee to make refunds to those properly entitled thereto.

C. In proper circumstances interim rate orders are legally permissible and may be in the public interest. There are numerous basic evils in piecemeal rate regulation which require that such regulation be strictly limited in application to those cases wherein its use is proper. Because of the particular fact situation in the instant case, particularly the danger of prejudice to the parties, the use of the interim rate order procedure is not proper.

ARGUMENT

I. In A Rate Proceeding Under The Natural Gas Act The Commission Has No Power To Reduce Tennessee's Zonal Rates Without Granting Parties A Hearing And The Decisional Process On The Essential And Controverted Issues of Cost Allocation And Rate Design.

Tennessee's rates for its six rate zones, presently or previously effective, and still subject to refund, are being contested as unduly preferential and prejudicial in violation of Section 4(b) of the Natural Gas Act by customers of Tennessee who are adversaries *inter se*. In addition, Tennessee and certain of its customers, including Columbia Companies, were and are litigants before the Commission and have conflicting interests. Tennessee is trying to get Commission approval for a number of different rate increases which varied as among zones and classes of customers within each zone. Columbia Companies, on the other hand, are seeking, among other things, a determination as to allocation procedures and methods which will result in them paying no more than their fair share of Tennessee's total cost of service.

As to Columbia Companies, the Court of Appeals said that:

> . . . the effect of the interim order is to continue the alleged discriminatory differential in favor of Zones 1, 5, and 6, although the Columbia companies, operating in Zones 2, 3, and 4, for several years have

been endeavoring to have the Commission determine a proper cost allocation among the zones." (R.642)*

As intervening party litigants, Columbia Companies have a statutory right to a "full hearing" which includes the decisional process granted to them by the controlling statutes.**

Columbia Companies have certain inchoate rights with respect to payments they made to Tennessee in excess of their fair responsibilities. All of Tennessee's customers pay "legal" rates. Therefore, the reason for the contingency of "legal" rates and the necessity for corporate security in the statutory scheme is *"to safeguard customers"* of Tennessee in their payments under the tariff pending the outcome of a hearing. *Mississippi River Fuel Corp. v. FPC*, 202 F.2d 899, 903 (CA3 1953).

A. Sections 4 and 5 of the Natural Gas Act are Controlling

Section 4(e) of the Natural Gas Act describes the procedure to be followed when superseding rates are filed with

*For example, the most material effect of the Commission's interim rate order was to reduce the components of Tennessee's originally filed rates as follows:

RATE REDUCTIONS

Rate Schedule	Southern Zone 1	Central Zone 2	Eastern Zone 3	Northern Zone 4	New York Zone 5	New England Zone 6
CD and G						
Demand	20¢	20¢	43¢	45¢	45¢	60¢
Commodity						
GS—Commodity	15¢	21¢	29¢	32¢	35¢	43¢
R and E						
Commodity	7¢	10¢	14¢	15¢	17¢	21¢
SO—Commodity			9¢	11¢	12¢	
SS—Demand					60¢	
I—Demand			40¢	45¢	45¢	
Commodity			27¢	32¢	32¢	

**The statutes involved are Sections 4 and 5 of the Natural Gas Act and Sections 5(b), 7(c) and (d), 8(b) and 12 of the Administrative Procedure Act.

the Commission. It provides that the Commission shall have authority "to enter upon a hearing concerning the *lawfulness* of such *rate* . . ." and after *full hearing*, "the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective . . ." (Emphasis supplied). This has been construed judicially to mean that the Commission "can make only such orders with respect thereto as would be proper" in a proceeding under Section 5(a) of the Natural Gas Act. *Hope Natural Gas Co. v. F. P. C.*, 190 F. 2d 804, 805 (CA4 1952) rehearing denied, 197 F. 2d 522.

Section 5(a) of the Act provides that: "Whenever the Commission, *after a hearing* . . . *shall find* that any *rate* . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission *shall determine the just and reasonable rate* . . ." (Emphasis supplied).

Section 4(e) provides further that the Commission shall have authority, ". . . *upon completion of the hearing and decision*, to order such natural gas company to refund, with interest, *the portion of such increased rates or charges by its decision found not justified* . . ." (Emphasis supplied).

Thus, a *full hearing and decision* are required before just and reasonable *rates* can be determined and refunds ordered of the portion of such *rates* found to be not justified. In view of what has heretofore transpired it must be stressed that it is just and reasonable *rates* which must be determined after full hearing and before refunds can be ordered. In the instant case the Commission found that the rates filed by Tennessee were "excessive" (R. 532). It is submitted that such a finding could not lawfully be made solely on the basis of the Commission's determination on the rate of return *cost* item since that determination was made not with respect to the particular

rates of Tennessee, but with respect to a *cost* factor in Tennessee's aggregate cost of service. The essence of the problem is that although the Commission could generalize that Tennessee's rates filed on a 7% rate of return basis would yield excessive revenues, the Commission could not legally determine which of Tennessee's many rates were excessive (or too low) without first properly determining allocations of the reduced cost of service to zones and classes of customers. The cost allocation and rate design steps in the rate making process are equally as important as the cost determination steps. All are used to determine the various portions of cost which each customer should bear in rate charges.* These factors are inextricably interwined in determining those rates which meet the statutory standards of lawfulness. This is particularly true in this case, where serious questions exist as to the discriminatory nature of the various rates *inter se*. Here, the Commission's error was to order Tennessee to use a contested method of cost allocation. Thus, the Commission required the assumption of an essential fact in issue to the prejudice of Columbia Companies.

If the cost allocation issue was one on which there was no basic disagreement among the parties, it might well be lawful for the Commission to have issued an interim order. Columbia Companies do not argue that this procedure is unlawful *per se*. In this case, however, the allocation issue is essential and is of such importance, that the Commission's failure to "decide" it prior to setting rates and

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*In *FPC* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 584, 62 S. Ct. 736, 742, (1942) the Court stated:

> "The establishment of a rate for a regulated industry often involves two steps of different character. . . . the second [step] is the adjustment of a rate schedule conforming to that level *so as to eliminate discriminations and unfairness from its details.*" (emphasis added)

ordering refunds is contrary to the requirements of Section 4.

It must be borne in mind that a single rate is not involved. Tennessee filed separate individual rates for different zones and classes of customers. The unlawful level of *each* of these rates and their relationship to each other is in issue. The Commission's finding necessarily contemplates only that the filed rates are in totality excessive and does not consider the extent, if any, to which each individual rate is unlawful. This we submit contravenes the express requirements of Section 4(e).

Diverse methods of allocation were offered by the parties in the G-11980 proceeding, the proceeding which, when finally resolved, will for the first time determine the proper method of allocating Tennessee's cost of service among the various rate zones for the purpose of designing rates. These methods yield such drastically different results that even if there is a substantial reduction in the total cost of service claimed by Tennessee, *there may be no rate reductions in certain zones depending on the allocation method ultimately found lawful* (R. 594-595, 598). This demonstrates that it is impossible for the Commission to find, as required by the act, that the specific zone rates filed by Tennessee are unlawful *until the allocation issue is determined*. As previously pointed out, the Commission had determined only that there should be an approximately $11,000,000 *over-all* reduction in the aggregate revenue level due to the reduced rate of return. However due to the Commission's failure to decide the allocation issue prior to issuance of its order, it has no basis for determining which of the filed rates in the six zones are unlawful, the extent, if any, that the individual filed rates should be reduced and consequently to whom refunds were lawfully due. The Natural Gas Act is for the protection of *all* consumers and not just for those consumers given unduly preferential rate

treatment by virtue of Tennessee's contested cost allocation method.

B. Section 16 of the Natural Gas Act Does Not Expand The Commission's Specific Statutory Powers

It would appear that Petitioners concede the inconsistency of the Commission's action with the express provisions of Section 4 when they seek to find statutory authorization for the interim order in Section 16 of the Natural Gas Act.

Section 16 which is entitled, "Administrative powers of Commission; rules, regulations and orders" provides:

> "Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. (Italics supplied)

The crucial factor which dispositively distinguishes those cases from the case at bar is that *none of those cases involved a deferred cost allocation issue which could be applied retroactively to alter the results of the Commission's interim rate order.*

The *Natural Gas Pipeline Co.* case, *supra*, related to a rate investigation by the Commission under Section 5(a) of the Natural Gas Act. The reduction of the company rates to reflect the Commission's finding of a lower rate of return was final and could not be altered on a retroactive basis, since the Commission's power under Section 5 of the Act is restricted to orders having prospective effect only. Thus, a subsequent determination by the Commission of another issue could not operate to vary the result of the interim order.

In that case this Court was not asked to pass upon the propriety of the interim order procedure; rather, certain parties merely contended that the order is invalid because the Commission did not itself fix reasonable rates as required by the act but instead merely directed the companies to file a new rate schedule which would result in the prescribed reduction in operating revenues." (315 U. S. at 583) Since the appropriateness of the interim order procedure was not questioned under the factual circumstance of that case, as was done in the instant proceeding, there clearly can be no conflict of decision.

Also of importance is the fact that the *Natural Gas Pipeline Co.* case did not even touch upon the problems of cost allocation among rate zones and rate design. Thus, that case did not involve the important issues that were before the Commission below and reviewed by the Fifth Circuit. Moreover, not only is the *Natural Gas Pipeline*

This point was conceded by counsel for the Commission in the oral argument on October 19, 1960 before the Court below on the motion for stay. (R. 628)

Co. case clearly distinguishable on this ground, but also it is authority for the proposition that parties must have "full opportunity to offer all their evidence both direct and in rebuttal, and full opportunity to cross-examine every witness. . . ." (315 U.S. 583-584) Columbia Companies did *not* have this opportunity in the instant Docket No. G-11983 proceeding, and the controlling collateral case, Docket No. G-11980 is now pending before the Court of Appeals for the District of Columbia.

The *Panhandle* case, *supra*, likewise did not involve a deferred cost allocation issue which could be applied retroactively to disturb the Commission's interim order. To the contrary, it appears from the Court's decision that the problem of zone allocation had already been decided prior to the issuance of the interim order. (256 F. 2d at 611)

The issue in the *Panhandle* case was completely unrelated to the problem involved in the instant proceeding. Panhandle's objection before the Third Circuit did not relate to the effect of some deferred issue upon the interim order. The company merely asserted that the order was invalid since it prevented the parties from making a supplementary showing as to recent developments and changes in circumstances occurring during the pendency of the total rate proceeding. (236 F. 2d at 608)

State Corporation Commission of Kansas v. *Federal Power Commission*, *supra*, involved a natural gas system which was not even zoned at the time the Commission issued the interim order under review. Certain parties to the proceedings had presented evidence proposing zone rates. The Commission declined to decide the question due to the inadequacy of the evidence and designated a subsequent case, Docket No. G-1881, as being appropriate for the exploration of the problem of zone rates. (206 F. 2d at 712)

Since the Commission determined that the problem of zone rates should be decided in a separate *future* proceed-

ing, it is clear that its interim order could not be affected thereby and could be considered final as to the issues decided.

Moreover, an examination of the opinion by the Eighth Circuit indicates that no objection was raised as to the propriety of the interim order procedure as such under the facts of that case. The company involved, Northern Natural Gas Company, apparently made no showing as to any possible harm that could flow to it, retroactively or otherwise, as a result of the interim order, judging from the Court's statement that "We are not shown any particular in which Northern was prejudiced by the Commission's action. . . ." (206 F. 2d at 716)

The other cases* cited by Petitioners as authority for the Commission's action are not in point. In the *New England Divisions Case*, the Court held that although the order issued by the Interstate Commerce Commission was provisional, nevertheless there had been a decision based on a full hearing on all the issues involved (261 U. S. at 200). The *Mississippi River Fuel Corp.* and *Episcopal Theological Seminary* cases do not bear on the issue of the lawfulness of the type of interim rate order here involved where cost allocation methods are yet to be finally determined. The purported relevance of those cases is not understood by Respondent.

Clearly, the facts and issues in the present case are quite different from those which existed in the decisions relied upon by Petitioners and those cases offer no authority for the action taken by the Commission in this case.

**New England Divisions Case*, 261 U. S. 184 (1923); *Mississippi River Fuel Corp. v. Federal Power Commission*, 121 U. S. App. D. C. 15, 348 F. 2d 134; *Episcopal Theological Seminary v. F. P. C.*, 209 F. 2d 228 (C. A. D. C. 1953); certiorari denied *sub nom. Pan American Petroleum Corp. v. F. P. C.*, 364 U. S. 865.

D. The Commission's Actions Violated Provisions of the Administrative Procedure Act

The Administrative Procedure Act, 5 U. S. C. 1001-1011, gives "all interested parties" to Federal administrative proceedings rights

"(a) to a hearing and decision upon notice and in conformity with sections 7 and 8" (Section 5(b), 5 USC 1004(b));

"(b) to present their case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts" (Section 7(c), 5 USC 1006(c)), so that such record shall be "the exclusive record for decision in accordance with section 8" (Section 7(d), 5 USC 1006(d)); and

"(c) to a ruling upon each such finding, conclusion, or exception presented" "as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record" (Section 8(b), 5 USC 1007(b)), and

"(d) to treatment whereby "all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons" (Section 12, 5 USC 1011).

It is submitted that by its interim order the Commission has denied all of these rights to Columbia Companies. In the underlying administrative proceeding Columbia Companies were not allowed to develop an evidentiary record, either by its own evidence or by cross-examination of Tennessee's witnesses, on the basic issue of cost allocation which is prerequisite to a determination of whether rate reductions for particular customers are proper. Cf.

Amarillo Borger Express, Inc. v. U. S., (1945 U. S. Dist. Ct.-ND Tex.) 138 F. Supp. 411; *FPC v. Natural Gas Pipeline Co. of America*, 315 U. S. 575, 583-584 (1942), 62 S. Ct. 736, 742; *West India Fruit & SS Co., Inc., et al. v. Seatrain Lines, Inc.*, 170 F. 2d 775 (CA2 1948).

It is submitted that the Commission acted as if the basic and material issues underlying the rate-discrimination controversy did not exist when it issued its interim piecemeal rate reductions on an incomplete record.

Although the Commission permitted one party, Tennessee, to put in its own style of cost allocation, it did not permit the others to do so. This is in direct violation of the mutuality of administrative due process expressed by Congress in Section 12 of the Administrative Procedure Act, 5 USC 1011.

E. The Commission's Interim Order was an abuse of the administrative process

The essence of the Commission's abuse of the administrative process is its indulgence in sheer expediency in the disposition of separate, but necessarily related, administrative proceedings so that a complicated basic controversy is arbitrarily decided for an interim period to the prejudice of Columbia Companies. This abuse strikes at the very heart of the administrative process and the ideal of administrative justice to all litigants under the Natural Gas Act and the Administrative Procedure Act.

A leading case on "abuse of administrative process" was decided by the Fifth Circuit in *Trunkline Gas Company* v. *FPC*, 247 F2d 159 (CA5 1957). In that case the Commission had ordered a full hearing into a phase of a natural gas company's rate and subsequently attempted to retrospectively limit the issues after the Examiner had issued his decision favorable to the company. The Court held that any such action is an abuse of the administrative process which the Commission may not do.

The Court said:

> "Since we hold that the parties have not had the full and adequate hearing and determination by the Commission of the merits of this matter as the statute requires, it would not be appropriate here for us to bypass the Commission, as it itself did . . . ." (page 1039)

The Court declared that the Commission had no legal right to "change the rules in the middle of the game" and required the Commission to "adjudicate this matter within the full framework fashioned by it." (page 1041)

In the present case the Commission's action is even more abusive to the administrative process than it was in the *Trunkline* case, *supra*. The Commission set Docket No. G-11980 as the proceeding in which to determine for Tennessee the basic and material issue of the principles and methods of cost allocation for rate making purposes which would be determinative of the propriety of rate reductions (if any) in Docket No. G-10083. The parties and the Examiner proceeded on that basis. Thus, by reducing rates in Docket No. G-10083 before Docket No. G-11980 is finally decided, the Commission refused to decide the rate discrimination controversy within the full framework fashioned by it. In its order in Docket No. G-11980 the Commission modified the Tennessee method of cost allocation somewhat, but not to the extent advocated by Columbia Companies who have brought the case before the Court of Appeals for the District of Columbia Circuit where it is pending as Case No. 17064. Columbia Companies submit that their petition for review of the Commission's cost allocation order in Docket No. G-11980 would be prejudiced if the Court does not uphold the Fifth Circuit in the matters now before it. Obviously the rights of the parties to a fair hearing and judicial review have substance or else the whole administrative process becomes a sham

for Commission fiat and Section 19 of the Natural Gas Act becomes inefficacious.

Columbia Companies submit that the intent of Congress that Section 4(e) rate matters are to be given preference and are to be disposed of as speedily as possible does not lessen the force of its declared intent that the Commission shall have a *hearing and decision* of such questions and *decide* the same within the statutory scheme of the Natural Gas Act.

In short, in the administrative process speed cannot be its own excuse. If the administrative tribunal is faced with a difficult or complex problem which is essential to rate making and is contested, speed must give way to the demands of the decisional process.

In the instant case, the Commission issued its interim rate reduction order in spite of a long-unresolved rate discrimination controversy and at a time when the basic cost allocation issue was pending before its examiner—at its direction—awaiting a decision after the record was closed and four months after the last briefs were filed with said Examiner. The Commission's choice to act arbitrarily in this unique context on an incomplete record and outside the decisional framework was an abuse of discretion. Likewise, its failure to act fast and promptly in Docket No. G-11970 is no excuse for its summary actions in Docket No. G-19983.

The courts have steadfastly refused to permit the Commission to act outside the scope of the Act it administers. Columbia Companies submit that the statutory framework is designed to protect all elements of the rate-paying public, including customer companies with differing positions as well as the natural gas company which serves them.

For example, Judge Prettyman held in *Minneapolis Gas Company* v. *FPC, et al.*, 294 F.2d 212, (CADC 1961), that there are certain "binding necessities of a decisional

process" under the Natural Gas Act, which once substantially entered upon by the Commission cannot be avoided or short circuited by resorting to a diluted process. Judge Prettyman fully realized "the pressure of events which apparently caused the Commission to adopt the course it did adopt." He sympathized with the difficulty in which the Commission finds itself, but held that "the statute does not permit the course it here proposes to follow."

In the instant proceeding before the Commission, it failed to consider separately the issue of undue rate discrimination which has existed among Tennessee's zones and classes of customers within each zone for many years.

The Fifth Circuit's action below deprives the Commission of the use of the interim-order technique only in those rate cases wherein there is a *bona fide* unresolved dispute on issues essential to the setting of lawful rates. It does not deprive the Commission of this technique in the proper case, such as those cited by the Commission in support of its action.

Call it "abuse of discretion" as Judge Wisdom did, or "abuse of process" as Columbia Companies do, it is submitted that the fragmentization of issues, which only when considered *in toto* properly present a rate question for decision, defeats rather than serves the policy of expedition evinced in Section 4(e) of the Act. This is amply demonstrated by the succession of multiple court and commission proceedings which the Commission's actions have brought forth in this and collateral cases. The placing of the cart before the horse is hardly the way to achieve speed.

II. Arguments Advanced By Petitioners In An Effort To Support the Commission's Action Are Shown To Be Unsound.

Unable to find specific statutory authority or a decisional plausibility for the issuance of the Commission's interim rate order, Petitioners have sought to interject other argu-

ments to support the Commission's action. These arguments are hereinafter considered and shown to be without merit.

A. "Inadequacy of the Refund Provision"

Petitioners argue that the action taken by the Commission was justified because the refund provisions of the Natural Gas Act are inadequate to protect the consumer which is the primary purpose of the Act. For example, at page 28 of its brief, the City of Pittsburgh states:

> "The Natural Gas Act does not provide complete protection for the consumer who bears the burden of excessive rates, since for the ordinary householder, the overpayment and refund process is not commensurate with an immediate rate reduction."

It is further alleged that Congress recognized the inadequacy of the refund provision by enacting the suspension provision of Section 4 which, Petitioners argue, was enacted for the protection of consumers.

These arguments do not support the validity of the Commission's action in this case. If the Natural Gas Act offers insufficient protection for consumers, which we deny, it is up to the Congress and not the Commission to amend the statute. The Commission can only operate within the statutory framework already established for it. Of course, an administrative agency may exercise broad authority *within* the statutory authority granted to it to effectuate the clear Congressional purpose, but this authority does not sanction action contrary to and beyond the express provisions of the statute. The action here taken by the Commission is precisely that, an express abnegation of the statutorily prescribed procedure of Section 4(e).

Likewise, whether or not Congress recognized the inadequacy of the refund provision in its enactment of the suspension provision of Section 4(e) is irrelevant to and, in fact, negates the propriety of the Commission's action

herein. If Congress did in fact recognize any inadequacy, it may be argued that such inadequacy has been eliminated by the enactment of the suspension provisions. Otherwise, why did Congress not enact further legislation designed to cope with any such inadequacy? If Congress intended that the Commission be given the right to act as it has in the instant case, why was not such intention clearly spelled out? It is submitted that no authority for what the Commission has done here is present in the Act.

Aside from the statutory authority to do so, Columbia Companies deny even that the action of the Commission serves to protect consumers. It must be borne in mind that Columbia Companies *themselves* here represent the interests of millions of their own direct and indirect customers. Columbia's attempt to eliminate discrimination from the rates of Tennessee will benefit its customers who in the final analysis bear the burdens of such discrimination in the form of excessive rates. It is surprising to find the Pennsylvania Commission and the City of Pittsburgh purporting to represent consumers of Columbia, taking a position contrary to that of Columbia Companies. The position urged by the Pennsylvania Petitioners may well result in refunds to consumers in other jurisdictions at the expense of Pennsylvania consumers.

B. Either Columbia Companies or Tennessee or Both Are Prejudiced By The Interim Rate Reduction Order.

For years the Commission has recognized that Columbia Companies were objecting to Tennessee's rates to certain zones (particularly New England) as being unduly pref-

*This position is not understood by Columbia Companies and, apparently, is subject to change. At the hearing, counsel for the City of Pittsburgh opposed any refund made on the allocation basis proposed by Tennessee (R. 379), yet the City of Pittsburgh opposes Columbia Companies' efforts to see that all consumers get their full due without expense to those not responsible for the overcharges.

erential—that is, too low—as a result of Tennessee's method of cost allocation. Obviously then, when the Commission reduced "legal" rates that were already in controversy as being too low, that reduction was prejudicial to Columbia Companies. At pages 23-26 of its Brief, the Commission readily admits that its interim rate reduction order might preclude Tennessee from recovering a 6½ per cent return on rate base for past collections. However, as to Columbia Companies and other customers in Zones 2, 3 and 4, the Commission merely characterizes as "implausible"* their prejudice which results from reducing "legal" rates in Zones 1, 5 and 6 before any decisional determination of the cost allocation issues on the basis of evidence. In short, the Commission summarily and arbitrarily reduced rates which may yet be found to have been too low.

Of course, since no evidentiary hearing on cost allocation was permitted in the "rate of return" phase of the underlying proceeding, the extent of the possible prejudice to Columbia Companies cannot be shown precisely. However, the record does show by reference to Docket No. G-11980 that the originally filed G-11980 rates to New England (which were reduced by the interim order) failed to recover the costs which Columbia Companies' method of cost allocation would have occasioned by more than $5,000,000 per year (R. 613**).

In answer to Columbia's claim of possible injury, Petitioners argue that in any event Columbia can recoup against Tennessee.

It is obvious that any recoupment from Tennessee would come from funds above and beyond those brought into issue by the Tennessee rate filing, assuming a 6½ per cent re-

*Commission Brief, page 41.

**The figure $5,238,011 appears in two places on the schedule in the record. This was a typographical error and was corrected in oral argument before the Fifth Circuit. The figure opposite line 5 (New York) under column 4 should be $1,065,500.

turn to Tennessee. In other words, any moneys thus recouped by Columbia Companies from Tennessee would result in Tennessee's earning the 6 per cent return found by the Commission to be proper. It is argued, however, that "the Commission's determination that a 6% percent (as opposed to a 7 percent) rate of return is proper does not carry with it a guarantee that Tennessee must in all events be permitted to retain revenues affording that rate of return for the interim period."* However, although regulation does not *guarantee* certain net revenues because of conditions beyond the control of those involved, nevertheless a business shall not be denied the *possibility* of a return found to be just and reasonable *because of the improper action of the regulator itself.* Purportedly, the Commission has allowed Tennessee a rate of return of 6⅛ per cent. Tennessee should have a right to a *possibility* of recovering such a return at least during the refund period without having to count on prevailing ultimately in the cost allocation controversy. If Tennessee is permitted a return of 6⅛ per cent, then it will be at the expense of Columbia Companies.

Thus either Columbia Companies or Tennessee or both may be irreparably damaged by the Commission's action.

It is urged, however, and this seems the core of Commissioners' argument, that by permitting Tennessee to file substitute rates based on a proper rate of return, but otherwise based on the company's cost claims, Tennessee and its customers would be placed in the same position as if Tennessee had originally filed improved rates predicated upon a proper rate of return. This was allowed by the Commission in its interim rate order. (R. 535-536). We submit that this reasoning is fallacious. If Tennessee's rates had been permitted to go into effect without suspension, they could be attacked only through a Section 5 proceeding.

*Brief for the Federal Power Commission, pages 45-46.

Since this section permits only *prospective* action with no reparations for past rates, there would be no issue with respect to refunds. However, under Section 4, where the rates were suspended and then put into effect subject to refund, the Commission's action in issuing the interim order does not leave the parties in the same position they would have been in if Tennessee originally filed rates based on a 6⅛ per cent rate of return. This is because that portion of the refund of $11,000,000, which came from the undercharged zones, would have been available to Tennessee to make refunds. As the court below properly found:

> "It is true, of course, that the allocation of costs in all six schedules was made by Tennessee; that if these allocations are correct and are approved Tennessee will not be damaged; that the burden rests on the applicant to justify each rate increase. But conditions change, costs are not static, and rates are at best an educated guess. It seems that in filing rates a public utility should not be held, at its peril, to the requirement of foretelling the decision of the Commission on the correctness of the rates. The statute appears to have been designed on the assumption filed schedules will have to be adjusted. Lawful rates may be determined only after a full hearing; until the Commission fixes rates the utility is protected by being allowed to collect at the filed rate but under bond [*] and subject to refund, and the consumer is protected by the refund of excess charges with 7 percent interest." (R. 643)

We submit that the definite possibility of injury directly due to the issuance of the interim rate order herein has been

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[*] The undertaking prescribed by the Commission and filed by Tennessee was that Tennessee would "refund at such times and in such manner as may be required by *final* order of the Commission, *the portion of the increased rates found by the Commission in this proceeding not justified*, together with interest thereon at the rate of 7 percent per annum." (R. 507-508) (Emphasis supplied.)

demonstrated. In this respect, the instant case materially differs from other "interim order" cases which did not contain any apparent cost allocation or rate design issues.

At page 42, footnote 30, of its brief, The Commission likens Columbia Companies' interest to a "stakeholder". This raises a very pointed comparison which can be used to explain the exact status of Columbia Companies in this proceeding, and the nature of the Commission's end as to them.

A "stakeholder" is one who holds money which is claimed by rival claimants, but in which he himself claims no interest. In order to prevent himself from being prejudiced by proceedings instituted by the rival claimants, the stakeholder can file a bill of interpleader to make the rival claimants litigate among themselves rather than with the stakeholder.

Here, in an analogous way, Tennessee (not Columbia Companies) is the primary stakeholder and Columbia Companies are claimants for refunds for a portion of Tennessee charges which are "not justified".* However, it cannot be settled as to which rates and charges are or were "not justified", until the issue of cost allocation and complaints of undue rate discrimination are settled finally.**

It is obvious that a judge in an interpleader suit would not direct payment of a portion of the stake if he had not determined on the evidence that the party receiving it had a right to same, and, if so, the magnitude of that portion.

*However, there are limits to this analogy, because Tennessee may be more than a mere stakeholder depending on the resolution of other elements of fixing for it just, reasonable and nondiscriminatory rates.

**As aforesaid, the cost allocation determination has been made (a) unjustified of the Tennessee methods and is pending before the Court of Appeals for the District of Columbia Circuit on petition for review filed by Columbia Companies in Case No. 17064.

Here, by its interim order, the Commission has arbitrarily and summarily decided, for example, that Tennessee's New England customers are entitled to a refund (part of the stake), although Columbia Companies have contended that not only should the New England customers have received no refunds at all, they should have paid more to Tennessee.

Tennessee cannot be sure, pending final Commission action, of how much of over-collections plus under-charges is due to each particular party. It may be that no refunds are due to the New England customers and that they actually should have paid more to Tennessee. By withdrawing some of the total receipts prior to a final determination, the Commission's action is akin to a court in an interpleader suit holding up a portion of the stake prior to determining which of the claimants is entitled to what share of the total. In the instant case, the action of the Commission results in withdrawing a portion of the money which may be due Columbia Companies and paying it out to other parties.

C. Interim Rate Orders May Be Used in Certain Situations, But Not in the Instant Case

Columbia Companies concede that in *proper* circumstances interim rate orders are legally permissible and may be in the public interest. Columbia Companies respectfully point out, however, that there are numerous basic evils in piecemeal rate regulation which require that such regulation be strictly limited in application to those cases where its use is proper. For example, in the underlying proceeding it is impossible to predict what effect subsequent modifications of the cost of service being litigated will have upon the costs to be allocated to various zones and classes of jurisdictional customers within each zone, as well as the classification of costs to the demand and commodity cost com-

ponents.* Furthermore, piecemeal rate regulation inherently causes delays in a final determination of rate controversies before the administrative body.

Moreover, if piecemeal rate orders are issued having elements of finality which are contested by certain of the parties, there will necessarily have to be piecemeal judicial review. The Law has always frowned upon the multiplicity of suits at the trial stage as well as at the appellate stage. Cf. *Cobbledick et al., v. U. S.*, 309 U. S. 323, 325, 60 S. Ct. 540, 541 (1940), where Justice Frankfurter said

> "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

Finally, piecemeal rate regulation must necessarily mean piecemeal refunds. At page 33, footnote 23, of its Brief, the Commission noted the "complexities" of refunds. It is because of these complexities that Columbia Companies submit that either refunding should be kept at the minimum and as the *last* step in the rate-making process as a result of the *final* determination of just and reasonable nondiscriminatory rates or else it should be confined

*For example, the cost per M cf. for gas in the field is recognized as a uniform commodity cost payable on a volume basis in all zones. The return on facilities as a cost is entirely different, depending upon the investment in facilities and types of service rendered by them in the various zones.

to settlements or special arrangements where the litigants are not prejudiced in their positions still to be determined pursuant to the administrative process.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

THE ADMINISTRATIVE PROCEDURE ACT, 60 Stat. 237, 5 USC 1001 *et seq.* provides, in pertinent part, as follows:

* * *

SEC. 5. [5 U. S. C. § 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives——

* * *

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * *

SEC. 7. [5 U. S. C. § 1006]. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * *

(c) *Evidence.* Except as otherwise provided, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received; but every agency shall as a matter of policy provide for

the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. While any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SEC. 8. [5 U. S. C. § 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

* * *

(b) *Submittals and decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions

of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * *

SEC. 12. [5 U. S. C. § 1011]. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.